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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ARIS SARIGIANIDES et al.,

Plaintiffs and Respondents,

v.

JAMES G. MORRIS,

Defendant and Appellant.

B220616

(Los Angeles County
Super. Ct. No. BC 385746)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed.

Morris & Associates, James G. Morris, Brandon C. Murphy and Bayleigh J. Pettigrew for Defendant and Appellant.

Curd, Galindo & Smith and Joseph D. Curd for Plaintiffs and Respondents.

* * * * *

Respondents B Five Corporation (B Five), Aris Sarigianides and Dimitrios Yortzidis brought an action to set aside two trust deeds under which appellant James G. Morris and Ha-Chun Ying Cheung (Cheung) acquired the sole asset of Micromark International, Inc. (Micromark), a commercial building located at 13651 Foothill Boulevard in Sylmar (hereafter the property). Cheung was the sole shareholder, officer and director of Micromark. After a trial to the bench, the court found that both deeds of trust were fraudulent transfers under the fraudulent conveyance statutes and decreed both instruments to be null and void. Morris appeals; we affirm.

FACTS

Until August 5, 2004, when a fire destroyed a substantial part of the property, B Five operated a restaurant, as well as a “LaundryMart,” in the building. Soon, litigation erupted between respondents, on the one hand, and Micromark, on the other, over fire insurance, repairs, habitability and like issues. There were two failed attempts at an unlawful detainer action brought by Micromark. Finally, respondents sued for damages. This action went into default and on December 14, 2007, respondents obtained a default judgment for \$2.4 million against Micromark.

Morris, an attorney, represented Micromark in the foregoing litigation until March 29, 2006, when he was discharged. Morris was rehired as Micromark’s counsel in October 2007.

The two deeds of trust were executed on December 31, 2007. The trial court, in its statement of decision, found that “Cheung and Morris executed their own liens on Micromark on December 31, 2007 and recorded them before [respondents] could get their judgment returned from the court and record an abstract.”

The trial court found that Cheung’s and Morris’s liens exceeded \$700,000; that respondents’ expert opined that in December 2007 the equity in the property was about \$400,000; and that in 2004 Micromark’s financial statement carried the property in its financial statements at a value of \$615,000. The court also found that in December 2007 Micromark owed Morris \$52,922 in legal fees.

THE TRIAL COURT'S RULING

“A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows: [¶] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.” (Civ. Code, § 3439.04, subd. (a).) The statute lists 11 factors to be considered in determining whether there was an “actual intent to hinder, delay, or defraud any creditor of the debtor.” We set them forth in the margin.¹

In order of the factors listed in footnote 1, the court found that the transfers were to insiders in that Cheung was the sole shareholder, officer and director of Micromark and Morris had been its lawyer in the past and was its lawyer at the time of the transfers. Micromark retained possession of the property after the transfers and Cheung retained control over Micromark. (The court did not rule on factor 3.) Micromark had been sued before the transfer and had obtained judgment before the transfer. The transfer involved all of Micromark’s assets. (The trial court did not rule on factors 6 and 7.) Morris took a note for \$500,000 even though he was owed only \$52,922 in fees and that there was no documentation for the loans Cheung purportedly made to Micromark -- Cheung took a

¹ “In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following: [¶] (1) Whether the transfer or obligation was to an insider. [¶] (2) Whether the debtor retained possession or control of the property transferred after the transfer. [¶] (3) Whether the transfer or obligation was disclosed or concealed. [¶] (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit. [¶] (5) Whether the transfer was of substantially all the debtor’s assets. [¶] (6) Whether the debtor absconded. [¶] (7) Whether the debtor removed or concealed assets. [¶] (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred. [¶] (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred. [¶] (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred. [¶] (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.” (Civ. Code, § 3439.04, subd. (b).)

note of \$203,000; the court concluded that Micromark did not receive reasonable equivalent value. In light of the judgment for \$2.4 million and considering Micromark's assets, Micromark was insolvent when the transfer was made; there was other evidence of insolvency, which is not necessary to detail here. The transfer was made shortly after the \$2.4 million judgment was entered; and Morris and Cheung were fully aware of the judgment when the transfers were made. (The court made no finding regarding factor 11.)

“A transfer or an obligation is not voidable under paragraph (1) of subdivision (a) of Section 3439.04, against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.” (Civ. Code, § 3439.08, subd. (a).)

The court found that neither Cheung nor Morris took in good faith and the transfers were not for a reasonably equivalent value. Since Cheung has not appealed, we will not discuss the trial court's lengthy and detailed ruling on the good faith issue as far as Cheung was concerned. We only note that the court found that her intent was to keep Micromark's only asset from respondents and that “Cheung knowingly sought advice on how to keep B Five from obtaining the Property. She certainly failed to prove her good faith.”

The court rejected Morris's efforts to demonstrate his good faith. In substance, Morris contended in the trial court, and reiterates this contention on appeal, that the entire transaction between him and Micromark was a way of financing attorney fees. Morris relied on *Wyzard v. Goller* (1994) 23 Cal.App.4th 1183, 1190, a case where a debtor facing an impending judgment entered into an agreement with his lawyer for the latter's fees. The fee agreement was secured by the debtor's real property. The court did not set aside the security agreement as a fraudulent conveyance, principally because the lawyer had earned the fees in question. The trial court distinguished this case from *Wyzard* on the ground that Morris took a note for \$500,000 and had earned only \$52,922 in fees. We return to this issue in the following part of this opinion.

The trial court found that Morris was well aware of all of the foregoing facts and circumstances when he took Micromark's promissory note. He knew of the \$2.4 million judgment and he acknowledged, according to the trial court, that respondents "would be upset by the Defendants' Notes and Deeds of Trust." The trial court concluded that "[a]ll of the facts and circumstances put Morris on notice that Micromark's intent in the transfers was to make sure that Micromark did not have to pay the \$2,300,000 judgment, but would be able to pay its shareholder and attorney first."

Finally, the trial court concluded that Morris failed to document the alleged loans that Cheung had made to Micromark and for which Cheung took the \$203,000 note from Micromark. Morris failed to do so even though he knew that it was very questionable that any of these loans had ever been made.

DISCUSSION

1. The Transaction Between Morris and Micromark Did Not Create a Security Retainer

Morris contends that the transaction between him and Micromark created a "Security Retainer," which is an arrangement under which the attorney holds funds paid by the client from which the attorney draws down fees as they are earned.²

Micromark did not give Morris money but a promissory note. The promissory note did not create a fund; it was nothing but a promise to pay money in the future. Micromark secured that promise with the deed of trust. In the event Micromark did not pay, Morris's recourse was against the security, the property; his recourse was not against a nonexistent fund.

² "The Security Retainer is typified by the fact that the retainer will be held by the attorneys to secure payment of fees for future services that the attorneys are expected to render. In such an agreement, the money given as a retainer is not present payment for future services. Rather, it remains property of the Debtor until the attorney applies it to charges for services actually rendered, and any unearned funds are returned to the Debtor." (*In re Montgomery Drilling Co.* (Bankr. E.D.Cal. 1990) 121 B.R. 32, 38.)

Morris is correct that an attorney may secure payment of fees by acquiring a note secured by a deed of trust in the client's property. (*Hawk v. State Bar* (1988) 45 Cal.3d 589, 601.)³ On the other hand, a lawyer may not engage in such a transaction if it is a fraudulent conveyance. We turn to this subject in the next part.

2. Morris Ignores the Factual Findings of the Trial Court That Demonstrate That the Transfer to Morris Was a Fraudulent Conveyance

Applying subdivision (b) of Civil Code section 3439.04, the trial court in this case found that Morris was an insider; that Micromark retained possession of the property; that Micromark was facing a judgment; that the transfer effectively involved all of Micromark's assets; that the note was out of all proportion to the fees owed; that Micromark was insolvent; that Morris was fully aware of the \$2.4 million judgment; and that Morris hatched the plan to frustrate collection of that judgment. All of this is found in the statement of decision.

Morris does not challenge the statement of decision; he just ignores it. But he does so at his peril. "Where [a] statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.) We think that the court's statement of decision lays out a very cogent and convincing case that Morris, just like Cheung, participated in the transfer with "actual intent to hinder, delay, or defraud" respondents, to quote from Civil Code section 3439.04, subdivision (a)(1). The confluence of the factors cited in the foregoing paragraph establish the fact of a fraudulent conveyance.

³ "We conclude that an attorney who secures payment of fees by acquiring a note secured by a deed of trust in the client's property has acquired an interest adverse to the client, and so must comply with the requirements of rule 5-101." (*Hawk v. State Bar, supra*, 45 Cal.3d at p. 601.) (Former rule 5-101 of the Rules of Professional Conduct required the attorney to fully explain such transactions, to offer only fair and reasonable terms, to give the client a copy of the agreement, and to give the client an opportunity to seek independent legal advice.)

3. Morris Has Failed to Show That He Acted in Good Faith

Just as in the trial court, Morris contends in this appeal that the note and deed of trust was just a device to finance attorney fees. In doing so, he relies heavily on *Wyzard v. Goller, supra*, 23 Cal.App.4th 1183. His reliance on this case, however, is misplaced.

As we have already discussed, the court did not find the conveyance in that case to be fraudulent because the attorney had in fact rendered the services which generated the fees that were secured by the client's real property. (*Wyzard v. Goller, supra*, 23 Cal.App.4th 1183, 1190.) This is not true of this case. Considering the face amount of the note acquired by Morris, the great bulk of the work was yet to be done. In essence, in *Wyzard* the competing equities were between the client's creditor and the client's lawyer *who had done all that he was going to do*. Both deserved payment but both could not be paid. Under these conditions, the court did not interfere with the client's choice.

The situation in this case is quite different. On the one hand, respondents are the beneficiaries of a valid and substantial judgment. On the other hand, there is a lawyer who claims he is going to do a lot of work in the future that will generate fees in the six figures and who was part and parcel, if not the mastermind, behind two fraudulent conveyances. *Wyzard* and this case simply do not compare.

4. Morris's Remaining Contentions Are Without Merit

Morris states that the trial court erred when it took note of the discrepancy between the note of \$500,000 and the fees of \$52,922 that Micromark owed Morris. Morris claims that Micromark was indebted "only to the extent of fees earned."

We have already pointed out that the promissory note did not create a fund. The fact of the matter is that if Micromark owes Morris nothing -- or, at least nothing until Morris does some more legal work -- why have a promissory note in the first place? Micromark may enter into a fee agreement with Morris under which it promises to pay his fees. It appears that this is how Morris is treating the promissory note -- but this is not what the note states. Unsurprisingly, in the note Micromark promises to pay Morris \$500,000.

During oral argument, Morris asserted for the first time that if the trust deed and note are held to be invalid, he should at least be protected to the extent of attorney fees actually earned, i.e., \$52,922. Quite apart from the fact that oral argument is far too late a stage for floating a new theory, the fact remains that the trial court's findings and conclusion invalidate the entire transaction, deeds of trusts, promissory notes and liens included. These instruments will not support a security interest for \$5 or \$500,000.

Contrary to Morris's assertion, this is not a case when the client actually transferred property to the lawyer as payment for future services. In this case, the property was not transferred but rather liens were filed on the property on the strength of the deeds of trust.

Morris is also mistaken that the encumbrance on the "property is not the amount of the lien but the amount of fees earned." That is not how the public record has it. There are two notes totaling in excess of \$700,000. There is absolutely nothing to suggest that the encumbrance is an ever-changing sum subject to the time that Morris spends working for Micromark.

Morris makes the astounding argument that the transfers were not made with the intent to hinder, delay or defraud creditors but were "rather to retain an attorney to provide necessary legal services." This is astounding because the trial court not only found that the transfers were fraudulent, the court also determined that the entire scheme was devised by Cheung and Morris to prevent respondents from recovering on their \$2.4 million judgment.

We find Morris's citation of cases from 1914 and 1890 completely beside the point. These cases antedate the Uniform Fraudulent Conveyance Act of 1918 and certainly antedate California's enactment thereof in 1939. (*Wyzard v. Goller, supra*, 23 Cal.App.4th 1183, 1188-1189.)

Morris claims that there was no bad faith in this case because "bad faith will be found only where the debtor has a fraudulent scheme and the attorney colludes or actively participates therewith, or the attorney has actual knowledge of facts, which would suggest to a reasonable person that the transfer is fraudulent." Actually, the trial court's

statement of decision found all of the foregoing (fraud, collusion, knowledge) in the facts of this case.

Morris also claims that the transfer was made for a reasonably equivalent value. The trial court found that Morris's note of \$500,000 was "vastly in excess of the amount he was actually owed as of December 31, 2007," which was \$52,922. The court also rejected the claim that Morris was only trying to secure his future fees because, as the court stated, "the transfer and lien were for \$500,000, and they clouded title of the Property to that full extent." We agree fully with both observations, as we do with the trial court's opinion that since Morris could cease rendering legal services at any time, the value of his projected future performance was rather speculative.

All in all, this case presents the paradigm illustration of a fraudulent conveyance.

DISPOSITION

The judgment is affirmed. Respondents are to recover costs on appeal.

FLIER, J.

We concur:

RUBIN, Acting P. J.

GRIMES, J.